

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Writ Petition (Art.227) No.385 of 2015**

1. Neeraj Katghar S/o Shri Ram Dulare Katghar Aged About 53 Years
2. Narendra Katghar S/o Shri Ram Dulare Katghar, Aged About 51 Years
3. Sunita Katghar D/o Shri Ram Dulare Katghar Aged About 47 Years
4. Anita Katghar D/o Shri Ram Dulare Katghar Aged About 45 Years
5. Sarika Katghar D/o Shri Ram Dulare Katghar Aged About 42 Years
6. Sarita Katghar D/o Shri Ram Dulare Katghar, Aged About 40 Years

All R/o Mohalla Sattipara, Nehru Ward Nagar, P.S. And Tahsil Ambikapur, District Surguja, Chhattisgarh

---- Petitioners**Versus**

1. Mahamaya Pratap Singh S/o Jhamman Singh (Died) Through Legal Representatives-
 1. Vihay Pratap Singh S/o Late Mahamaya Pratap Singh
 2. Durjay Pratap Singh S/o Late Mahamaya Pratap Singh
 3. Malkhan Singh S/o Late Mahamaya Pratap Singh.
 4. Sulekh Pratap Singh S/o Late Mahamaya Pratap Singh

All Through Power Of Attorney- Naresh Sharma, S/o Late Shri Ramswaroop Sharma, R/o Sattipara, Tahsil Ambikapur, District Surguja At Ambikapur, Chhattisgarh

2. Sanmar Pratap Singh, S/o. Jhamman Singh (died) name deleted

---- Respondents

Shri CJK Rao, counsel for the petitioners.
Shri Manoj Paranjpe and Shri Vikram Dixit, counsel for the respondents.

Hon'ble Shri Justice Chandra Bhushan Bajpai**Order****23.12.2015**

Heard.

2. As per facts in brief in the instant petition is that respondents/ appellants had preferred Revenue appeal 04/A-06/2007-08 before the First Appellate court i.e. Additional collector, Ambikapur District Surguja against the order on 10.02.84. In the said revenue appeal the petitioner/respondent despite service not chosen to contest the said appeal. The Additional Collector Ambikapur vide order dated 30.01.09 allowed the appeal and set aside the order passed by the Nazool Officer Ambikapur dated 10.02.84 and further directed that name of the appellants (respondents in the present petition) be recorded for the suit land in the revenue record. Against the said order the present applicants had filed second appeal No.582/2009-2010 before the Additional Commissioner Surguja Division Ambikapur. The said second appeal was dismissed by the second appellate court vide order dated 10.02.2010 wherein it is held that as the second appeal preferred was not filed within the limitation and not any application under Section 5 of the Limitation Act for condonation of delay was also filed, hence, the second appeal is time barred, the same is dismissed. Against the dismissal of the second appeal, the present applicant filed an application before Additional commissioner who has passed the impugned order in the second appeal for review along with review application. They also filed application under section 5 of the Limitation Act and the application under Section 35 of the CG Land Revenue code. The Additional Commissioner Surguja Division vide order dated 11.5.10 dismissed the review application and held that as there is no any error or lapses in the order passed in the second appeal, the review application is without foundation and the same is rejected. After the order passed by the Additional Commissioner in the review petition, present applicants have preferred a revision before the Board of

Revenue, Chhattisgarh, Bilaspur. The Board of Revenue in Revision Case No.RN/16/R/A-6/303/2010 vide order dated 13.4.15 dismissed the revision and held that as there is no error or lapses and there is no any error in the matter passed in the second appeal and also in the review petition as the same is lawful, hence the court below dismissed the revision filed by the applicants. Against the said order the applicants had filed the instant petition under Article 227 of the Constitution of India, wherein they have taken the ground that the Board of Revenue while passing the impugned order acted illegally and committed material irregularity and initially the court held that the applicants have a prima facie good case in their favour and also granted status quo in the favour of the applicants but subsequently dismissed the revision filed by them. Further ground taken that the court below ought to have held that the petitioner have explained the delay in their affidavit filed in support of the appeal. Further taken the ground that learned court below ought to have held that the petition would have been permitted for hearing for filing the application for condonation of delay. It is prayed that since the impugned order is illegal, arbitrary, erroneous without applying of mind and contrary to law, the same be set aside and the court may issue appropriate direction in favour of the petitioners and on the basis of the facts and circumstances of the case.

3. The answering respondents 1 to 4 i.e. LR's of deceased respondent No.1 Mahamaya Pratap Singh had filed their return in the petition and in their reply it is stated that order dated 10.02.2010 had never been challenged by the applicants and the same attained finality as never been challenged by the applicant before the higher authority. Instead they challenged the order dated passed in second appeal dated

10.02.10. The applicants have preferred review petition and the same was dismissed by the revenue court which held that there is no error apparent on the face of the record. The scope of review is very limited. After the order passed in the review petition on 11.5.10, the petitioners had preferred a revision against the order passed in the review petition. As no appeal or revision were preferred against the order of the Commissioner dated 10.02.2010, the ground of dismissal in the second appeal on the basis of the limitation cannot be entrained and thereby there is no any illegality or impropriety committed by both the Courts below i.e. the order dated 11.5.2010 passed by the Additional commissioner in a review petition and also the order dated 13.4.2015 passed by the Board of Revenue. Hence it is prayed that the instant petition may be dismissed.

4. Heard both the parties and perused the record.

5. Learned counsel for the petitioner would submit that on basis of the ground taken in the instant petition the same may be allowed and the order passed by the Court below dated 13.4.15 be set aside, the matter may be heard on its merits after allowing the application for condonation of delay and the matter may be admitted on its merits. It is further argued that in the memorandum of appeal, at para 11, the applicant had shown facts regarding knowledge of the order passed by the First Appellate Court and thereby it is submitted that the Second Appeal is preferred within its limitation after the knowledge of the order passed in First Appeal. Learned counsel further submitted that the memorandum of appeal before the Second Appellate Court is duly supported by affidavit and in para 2 of the affidavit, the applicants have mentioned the date of knowledge, reason for delay as earlier there was

no knowledge of the case, they have not received any notice, there was no publication. Learned counsel further submitted that as the order dated 30.1.2009 passed behind their back, though there was a delay of 11 months, the Second Appeal was preferred within its limitation as the applicants were not in knowledge of any of such order. It is further prayed that the issue involved in the matter is not decided on its merits, delay may be condoned and the matter may be heard on its merits.

6. Learned counsel for the petitioner placed reliance on **2007(2)CGLJ 379, Ahmed Mansuri Vs. Shri Nandu Sao & Others**, and submits that as the coordinate Bench of this Court relied on 1996 *MPLJ 330 Suresh Kumar and others Vs. Kurban Hussain Taiyab Ali (Firm) and others* in which it has been held in para 9 of the order that :

“Section 5 is in the nature of proviso to section 3 of the Limitation Act and would dilute the rigour of Section 3. For condonation of delay under section 5, Limitation Act a formal application would not be required if the facts presented before the Court satisfy the judicial conscience of the Court that the applicant before it was prevented for sufficient cause in bringing the proceedings well within limitation, if the court is of the opinion that in absence of formal application the delay cannot be condoned then it is always the duty of the Court to give an opportunity to the applicant before it to move an application explaining the cause for delay and seek condonation under section 5, Limitation act. The applicant must get proper opportunity to explain the circumstances which prevented him from drawing proceedings well within limitation. *AIR 1981 Oriss 126, AIR 1985 Pat. 148, AIR 1989 Gjj. 44, Rel. (Paras 5 & 9)*”

7. It is submitted on behalf of the applicants that mere non filing of the application under Section 5 of the Limitation Act would not cause any damage to the parties. The Court ought to have given an opportunity to the applicants before it moved the application explaining the cause for delay and seek condonation under the Limitation Act. Learned counsel would submit that as the case law cited is applicable hence, instant petition may be allowed with the relief as prayed.

8. Per contra, learned counsel for respondents 1 to 4 while supporting the reply filed by them in the matter and stated that despite service to the applicants before the Additional Collector, they have choosen not to take part in the proceedings in the First Appeal. Thereby, it cannot be said that the order has been passed behind their back and they have no knowledge. Once they chosen not to appear before the First Appellate Court despite service, for the post effect they are responsible. Learned counsel further submitted that in the review petition, the applicants have not challenged the order dated 10.2.2010 passed by the Second Appellate Court and thereby the said order attains finality. Even in the review petition the applicants had not challenged the limitation part and also before the revisional Court the same has not been challenged. On the other hand, the applicants had challenged the order passed in the review petition before the Board of Revenue. As the Second Appeal was barred by Limitation for about 11 months, no delay is explained as required, no any application under Section 5 of the Limitation Act and the Second Appeal was beyond the Limitation because the applicants themselves not took part in the hearing before the First Appellate Court. Review petition has limited scope and the reviewing Court and the revisional Court after appreciation have found no any apparent error in the order, dismissed the review application and also the revision petition. As the order dated 30.1.2009 passed by the First Appellate Court is not under challenge the same attains finality, hence, the applicants failed to demonstrate the case in their favour. Hence, the petition may be dismissed.

9. Learned counsel for the respondents placed reliance in **2013(5) Scale 447, Municipal Corporation of Delhi vs. Yashwant Singh**

Negi, wherein the Hon. Apex Court held in para 3 & 4 of its judgment that :

“[3] We find ourselves unable to agree with the views expressed by this Court in *Eastern coalfields Limited*. In our view, once the High Court has refused to entertain the review petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the review petition because on the dismissal of the review petition the principle of merger does not apply. In this connection reference may be made to the Judgment of this Court in *Manohar S/o. Shankar Nale and others v. Jaipalsingh S/o. Shivralsingh Rajput and others*, 2008 1 SCC 520 wherein this Court has taken the view that once the review petition is dismissed the doctrine of merger will have no application whatsoever.

This Court in *DSR Steel (Private) Limited v. State of Rajasthan and others*, 2012 6 SCC 782 also examined the various situations which might arise in relation to the orders passed in review petitions. Reference to paragraphs 25, 25.1, 25.2 and 25.3 is made, which are extracted below for ready reference:

“25. Different situations may arise in relation to review petitions filed before a court or tribunal.

25.1. One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the [pic] appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition

25.2. The second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law.

25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

4. We are in complete agreement with the principle laid down by this Court in **DSR Steel (Private) Limited** (supra) and applying the 3rd situation referred to therein in paragraph 25.3, we are inclined to dismiss this special leave petition. We find force in the contention made by the learned senior counsel appearing for the Respondent that this SLP is not maintainable, since the main order was not challenged but only the order passed in the review petition alone was challenged in this SLP. Hence, the SLP is, therefore, not maintainable and the same is dismissed.

10. Learned counsel further placed reliance on **2012(6) SCC 782, DSR Steel (P) Ltd vs. State of Rajasthan & Ors.**, wherein the Hon. Apex Court held in para 12, 13, 14 & 15 of its judgment that :

12. So also the question whether an order passed by the Tribunal in appeal merges with an order by which the Tribunal has dismissed an application for review of the said order was argued before us at some length. Learned Counsel for the Appellants contended that since a review petition had been filed by two of the Appellants namely, J.K. Industries **Ltd.** (Now known as J.K. Tyres and Industries **Ltd.**) and J.K. Laxmi Cement **Ltd.** in this case, the orders made by the Tribunal dismissing the appeals merged with the orders passed by it in the said review applications so that it is only the order dismissing the review application that was appealable before this Court. If that were so the period of limitation could be reckoned only from the date of the order passed in the review applications.

13. Different situations may arise in relation to review petitions filed before a Court or Tribunal. One of the situations could be where the review application is allowed, the decree or order passed by the Court or Tribunal is vacated and the appeal/proceedings in which the same is made are re-heard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the

review petition. The second situation that one can conceive of is where a Court or Tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review reversed or modified. Such an order shall then be a composite order whereby the Court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for purposes of a further appeal, if any, maintainable under law.

14. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

15. The decisions of this Court in ***Manohar S/o Shankar Nale and Ors. v. Jaipalsing S/o Shivalalsing Rajput*** (2008) 1 SCC 520 in our view, correctly settle the legal position. The view taken in ***Sushil Kumar Sen v. State of Bihar*** (1975) 1 SCC 774 and ***Kunhayammed and Ors. v. State of Kerala and Anr.*** (2000) 6 SCC 359, wherein the former decision has been noted, shall also have to be understood in that light only.

11. Learned counsel for the respondents would submit that as both the case laws cited are applicable in the matter and as the main order is not challenged and the review would not merge in the original order, hence, order passed by the revenue Board or the revisional Court is proper, hence, petition may be dismissed.

12. On close scrutiny as the matter is on the basis of facts as in the documents itself emerges is as under :

(1) The applicant despite service not appeared or took part in the hearing before the Additional Collector thereby, the applicants

themselves chosen not to defend them before the First Appellate Court and thereby it cannot be held that order passed by the First Appellate Court on 30.1.2009, is behind their back.

(2) So far as facts regarding non filing of the application to condone the delay, undisputedly, the delay about 11 months. No any application has been filed before the Additional Commissioner in the Second Appeal. After perusal of para 11 of the memorandum of appeal and also as per para 2 of the affidavit, it appears that initially the applicants despite service not appeared before the First Appellate Court, facts mentioned in para 11 of the memorandum of appeal and para 2 of the affidavit are not correct facts and cannot be accepted as per para 4 of the order dated 30.1.2009 in the first appeal. From perusal of the entire material, the Second Appellate Court duly appreciated that as the appeal is not filed within limitation, despite the facts in the affidavit as no application for condonation of delay under Section 5 of the Limitation Act is filed by the applicants, hence, as the appeal is time barred Second Appellate Court dismissed the appeal as it is time barred. If we consider the facts as mentioned in the memorandum of appeal, and in the affidavit it goes to show that if we consider the above facts in the light of the facts that the applicants were noticed, not defended themselves before the First Appellate Court, the facts mentioned in the memorandum of appeal regarding no knowledge for the order cannot be held as true. It is not a case where delay is properly explained, it is a case where there was a delay. The facts stated that the appeal is within limitation from the date of knowledge cannot be accepted as appreciated above thereby the appeal was barred by Limitation and no application for condonation is secured by the law.

13. After perusal of the order passed by the reviewing Court, above facts the appeal was not within limitation, doctrine of no knowledge is not applicable to the present case, the reviewing Court after appreciation of the entire facts along with limited scope in the matter passed a detailed order. In view of this Court, the same cannot be held as illegal or improper and it cannot be held that scope available was not considered by the reviewing Court. The same is with the order of the revisional Court. The revisional Court in its detailed order held that the appeal was time barred, no application was filed for condonation of delay. On the other hand, it was a clear case of the applicants that the appeal is not time barred and whatever facts were chosen to demonstrate that the appeal was within limitation cannot be accepted even prima facie. I do see any illegality or impropriety with the order passed by the Board of Revenue dated 13.4.2015 and also order passed by the First Appellate Court was not challenged before any of the authority after the dismissal of Second Appeal by the Second Appellate Court thereby on the other hand also the order attains finality.

14. So far as the reliance placed on behalf of the applicants in Ahmed Mansuri (supra) is not applicable to the present case, because in the present case the applicants were taking a ground that the appeal is within limitation as the said ground is not available. Consequently, in view of this Court, as the facts are different the same is not of any help to the applicants. Also in the review petition or before the revision Court nothing is challenged for the order dated 10.2.2010 and the same cannot be merged while appreciating the review petition or the revision petition.

15. After due consideration, this Court is of the view that the applicants have failed to show any illegality or impropriety committed by the Courts below which requires any interference. Consequently, the instant petition is dismissed. No order as to cost.

Sd/-
(Chandra Bhushan Bajpai)
JUDGE